IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-760277 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Frisco CABALES

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1832

Frisco CABALES

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 30 October 1968, an Examiner of the United States Coast Guard at New York, New York suspended Appellant's seaman's documents for nine months outright plus three months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as chief cook on board SS ALBION VICTORY under authority of the document above captioned, Appellant:

(1) on 9 and 17 October 1967, at Cam Ranh Bay, RVN, wrongfully failed to perform assigned duties, and

(2) on 8 November 1967, wrongfully deserted the vessel at Bataan, P.T., and,

while so serving as cook aboard SS SEATRAIN NEW JERSEY, wrongfully failed to join the vessel at Manila, P.I. on 24 June 1967.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence voyage records of both vessels and the testimony, taken by deposition on oral interrogatories, of the master of ALBION VICTORY.

In defense, Appellant offered in evidence twenty documents.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of nine months outright plus three months on twelve months' probation.

The entire decision was served on 4 November 1968. Appeal was timely filed on 7 November 1968, but not perfected until 19 December 1969.

On 23 December 1969, Appellant filed a supplementary brief, asserting that an argument had been omitted from his earlier brief 'in the rush to get it filed as soon as possible.' Although the normal review process had already been instituted, the supplemental brief has been considered.

FINDINGS OF FACT

ON 24 June 1967, Appellant was serving as a cook on board SS SEATRAIN NEW JERSEY and acting under authority of his document. On that date Appellant failed to join the vessel at Manila, P.I.

On 6 and 17 October 1967, and on 8 November 1967, Appellant was serving under authority of his document as chief cook of SS ALBION VICTORY. On 6 and 17 October 1967, while the vessel was at Cam Ranh Bay, RVN, Appellant failed to perform his duties. On 8 November 1967 he deserted from the vessel at Bataan, P.I.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant's numerous points are discussed in the OPINION below.

APPEARANCE: Fuller Hopkins Lawton & Taussig, New York, New York, by William E. Fuller, Esquire.

OPINION

I

I am faced at the outset here with the fact that Appellant's documents filed on the appeal, incorporating as they do an argument made to the Examiner in support of a motion to dismiss in the course of hearing, are not easily resolvable into distinct and specific assignments of error. To permit Appellant his appeal, I undertake to frame grounds for the appeal as I apprehend them from the papers filed.

II

One easily discernible argument is that there was lack of jurisdiction because ALBION VICTORY is a "public vessel." In this connection I recognize immediately that in Appellant's civil action it has been held that ALBION VICTORY was a public vessel at the time in question and, admiralty claims, subject only to the "Public Vessel Act" (Cabales v. United States, D.C. S.D., 300 F. Supp 1323;

aff. CA2 (1969), 412 F. 2nd 1187).

The fact that a vessel is a "public vessel" is irrelevant to the suspension and revocation authority in R.S. 4450, 46 U.S.C. 239, as implemented by 46 CFR 137. It is true that public vessels are generally exempted from the provision of Title 52 of the Revised Statutes by the first sentence of R.S. 4400(a), 46 U.S.C. 362(a). this does not mean that persons serving aboard public vessels are not amenable to suspension and revocation action under 46 U.S.C. 239, but the reason need not be stated here because another statute obviates the question.

Act, Oct. 25, 1919, ch. 82, 41 Stat. 305 (46 U.S.C. 363) specifically subjects inspected machine-propelled vessels owned by the Department of Commerce to the provisions of Title 52 of the Revised Statutes. ALBION VICTORY is a vessel owned by the Department of Commerce. There is no contradiction between ALBION VICTORY's having been held to be a public vessel under the Public Vessel Act and the upholding of jurisdiction over the vessel under Title 52 of the Revised Statutes, and over Appellant's Merchant Mariner's Document under 46 U.S.C. 239.

III

Another discernible complaint of Appellant is that he was not furnished a copy of a pertinent official log book entry of ALBION VICTORY by the Investigating Officer prior to the opening of the hearing in this case. This argument is specious in the extreme.

Appellant admits that he had access to the document so as to be able to read it, but avers that this access was not sufficient to allow him to prepare a defense for the hearing, and that once the hearing had begun his possession of the copy of the document came too late to assist him.

Appellant had ample remedy for any prejudice he could possibly have suffered here. He was on notice that the hearing had to do with "desertion" from ALBION VICTORY. He did see the log entry and, could he have shown any reason for surprise at finding what the contents of the entry were, he could have asked the Examiner for any time needed to prepare the defense. The hearing began on 26 February 1968, at which time Appellant had already seen the log entry even if he did not have a copy. The hearing did not reach its final open session until 1 July 1968, and the decision was not issued until 30 October 1968.

Appellant cannot be heard seriously to challenge a failure to give him a copy of a piece of paper before 26 February 1968 as preventing him from preparing an adequate defense.

It is also perceived that Appellant, in questioning the use of the word "wrongfully" in the specification of desertion and in declaring that the specification as alleged is a mere conclusion of law, is challenging the adequacy of the specification as constituting proper notice of an act of misconduct cognizable under the statute. He say that the acts are not sufficiently spelled out in the specification so that Appellant was not on notice of a offense and of what he had to reply to.

Arguments about the use of the word "wrongfully" by itself, do not concern me greatly. When the word is omitted in an allegation of a homicide, where indictment language calls for precision, there is a problem, but I see no reason why an allegation of wrongfulness cannot be added to an allegation in an administrative proceeding, if someone is disturbed by the absence of the word. At the same time, I see no reason why the adverb "wrongfully" should be added to an allegation of misconduct when the words of the allegation spell out a "wrongful" act. There is, for example, no reason to utilize the word "wrongfully" in connection with an allegation of "assault? or assault and battery." All "assaults" are wrongful. Available defenses do not constitute assaults as "not wrongful." Accepted defenses characterize the act as not "an assault."

To look to the instant case, I hold that an allegation of "desertion" need not allege that the desertion be "wrongful." Desertion is an offense; it is an act of misconduct; there is no reason why the description of the act should be characterized by an adverb.

Appellant's argument, as I read it, goes even beyond this point. He asserts that even if wrongfulness is alleged it is not enough to allege that a seaman deserted his ship, without more. This argument I reject completely as without foundation.

Congress has never attempted to define desertion from a merchant vessel but it has declared desertion to be an offense. Many courts have ruled in many cases that certain acts have constituted desertion and that other acts have not. If Appellant's argument were accepted, it would be found necessary in an allegation of desertion to assert that the act came within all court decisions upholding desertion findings and was outside of all decision which found no desertion.

Appellant misconceives the matter completely. Once Congress has declared that desertion from a ship is wrong (46 U.S.C. 701), an allegation under R.S. 4450, 46 U.S.C. 239, need only allege, to state an assertion of "misconduct," that a person "deserted" from his vessel, without more. "Desertion" need not be defined in a specification.

It is not inappropriate to note that Appellant raised this argument before the Examiner and was informed by the Examiner that "desertion" was a term so well known that its elements need not be spelled out in a specification. Appellant, possibly facetiously, asked the Examiner to "educate" him as to the meaning of this well known term. The Examiner, briefly and correctly, referred Appellant to the volume of case law explicating the concept of desertion in Federal court decisions. Appellant then moved, to

what end cannot be surmised, that since the word "desert" connoted a wrongful act the word "wrongfully" should be stricken from the specification as superfluous. The Examiner denied the motion without explanation, but possibly operating on the theory that mere surplusage does not invalidate a specification and that it would be a waste of time to engage in a semantic game. With respect to the desertion specification, I hold that Appellant, in renewing his objection on appeal that wrongfulness was not separately proved, cannot be taken seriously, since he himself argued that the allegation itself was surplusage.

IV

Appellant also attacks the word "wrongfully," as found proved in the specifications other than the desertion specification. He argues that it is not enough to prove a failure to join or a failure to perform a duty unless these failures are also proved to be "wrongful."

With respect to "failure to join," Congress has stated to be an offense, in the second item of 46 U.S.C. 701: ..."neglecting or refusing without reasonable cause to join his vessel..."

Little attention has been given to the meaning of this provision in the courts, probably because the penalty applicable is usually too small to warrant litigation. Failures to join have, however, frequently been before me on appeal from examiners' decisions. It may be well here to summarize prior holdings and state in full the principles which govern the act of misconduct involved.

The statute contemplates two different offenses. One is a negligent failure to join. The other is a refusal to join without reasonable cause. I cannot read the "without reasonable cause" phrase as applicable to both the "neglect" and "refuse" provisions because the term "neglect" excludes reasonable cause as a defense. "Refusal" is not involved in the instant case, but the theory of pleading in administrative proceedings, I think, must be the same.

As a practical matter in the area of vessel operation, a master of a vessel, before making his log entry that a seaman has failed to join his vessel, cannot institute inquiry into whether the seaman's absence from the vessel was through neglect or for a justifiable cause, such as wrongful arrest or accident without fault of the seaman. Since the master is required to make an entry in such a case by law, it is obvious that the "failure to join" raises presumptions which must be overcome by the seaman. This presumption carries over into proceedings to suspend or revoke a seaman's document for "failure to join."

The pleadings need only allege "failure to join." There is a presumption, under the statute, that a "failure" is wrongful. Not to do something which one has no obligation to do is not a "failure" to do anything.

It may be said then that allegations of "failure to join" need not contain the qualification of "wrongful" to constitute a valid specification under R.S. 4450. If a failure to join is alleged and established, the burden is upon the person who failed to join to convince the examiner that the failure was not negligent, or, if refusal to sail is involved, that the refusal was with reasonable cause.

In the case of "failure to perform duties," it is also unnecessary to allege that the failure was "wrongful".

V

Appellant appears to argue that the mere service of charges under R.S. 4450 against a person who holds a Merchant Mariner`s Document is improper because In re Dimitratos, D.C. N.D. Cal. (1949), 91 F. Supp. 426, says that a seaman's document may not be suspended without hearing. His reasoning is that the service of charges amounts to a suspension because no one will hire a person who is awaiting proceedings under 46 CFR 137. If this argument of Appellant were to be accorded any weight, no person could ever be served with charges in any case. In re Dimitratos, cited above, cannot be distorted to mean that no hearing can be held at all; means only that a hearing must be held before a suspension is ordered.

Appellant's argument has no merit at all.

VI

Appellant argues that imposition of statutory penalties for desertion (loss of wages) and action to suspend or revoke a seaman's document for the same act of misconduct constitute double jeopardy, prohibited by the Fifth Amendment. In support of this argument, Appellant cites Benson v. Bulger, D.C. Wash., 251 Fed. 757, affirmed sub. nom. Bulger v. Benson, CA 9 (1920), 262 Fed. 929.

The "Benson" decision is irrelevant to this case. See Decision on Appeal No. 1574.

As to the basic contention, I repeat, in accordance with the Decision on Appeal just cited, that R.S. 4450 itself resolves the issue for me. By the 1936 amendment to the statute Congress

specifically provided for both proceedings to suspend or revoke a license and the simultaneous (or subsequent) action by a U.S. Attorney to undertake criminal prosecution. It is not for an administrator to pass upon the constitutionality of the Congressional authorization and direction for him to act.

VII

Appellant also complains that since the United States owned ALBION VICTORY, the master of the vessel was an employee of the United States, and since I am an employee of the United States, and the Examiner who heard the case is an employee of the United States, an impartial hearing was impossible.

There is no need to belabor the point that U. S. District Judges, to whom Appellant voluntarily resorted for resolution of his claim for wages, are also agents of the United States created by the same Congress which established the executive agencies and agency procedure.

Appellant's claim that he could not have an impartial hearing is an attack on the laws governing administrative procedure. 5 U.S.C. 551-559. Here again, an administrator must refuse to entertain questions as to the validity of Acts of Congress.

VIII

Appellant argues that the Federal Regulations at 46 CFR 137.03 and 46 CFR 137.20-102 prevent an examiner from entering any finding as to a specification except "proved" when there is an official log book entry made in accordance with the statutes. This assertion i/s not correct. The pertinent regulation merely declares that when an official log entry is properly made it is prima facie evidence "of the facts recited therein,"

In view of some loose language that has been used, it must be noted that the regulation does not speak in terms of "prima facie case." This term, I think, has little meaning in administrative proceedings. The criterion for judgment as to validity of findings of a trier of facts is whether the findings are based on substantial evidence.

The regulation does not say that other forms of documentary evidence do not constitute prima facie evidence of anything; it says only that a log entry made in substantial compliance with the statutes is always substantial evidence. The regulation, however, does not prevent an examiner from weighing the whole record. He

may assign more weight to other evidence than he does to the log entry and thus reach conclusions contrary to what the log entry would tend to call for.

It appears clear that, under the regulation, if a proper log entry and nothing else was before an Examiner, his findings would have to follow the log entry or else his decision would be arbitrary and capricious. But the regulation does not inhibit evaluation of other evidence so as to lead him reasonably to conclude that the other evidence was entitled to more weight than the log entry.

Nothing, however, supports Appellant's contention that a finding of "proved" must necessarily result in each case in which there is a properly made log entry. A person has the opportunity at hearing to persuade an examiner that other evidence adequately refutes a log entry. If he cannot so persuade an examiner and the properly made log entry recites facts in an ascertainable fashion, there is no reason to disturb an Examiner's findings based on the log entry.

I hold here both that Appellant's construction of the effect of 46 CFR 137.20-102 is wrong, and that the Examiner had substantial evidence on which to predicate his finding that Appellant deserted from ALBION VICTORY.

Appellant's counsel raised this same argument before the Examiner, that the Examiner was bound to find a specification proved if there was a proper log entry applicable. The colloquy is quoted:

> "[Counsel]: If you follow the regulations on log book extracts, that they are admissible, which your are bound to follow, and if you follow the regulation that they are prima facie evidence of the offense, which you are bound to follow, you are, in turn, required then on the basis, because it is now evidence, that you find him guilty which your are required to do in accordance with the regulations. And I would just as soon get this farcical part of it over with.
>
> "EXAMINER: I don't want to characterize this...but you don't sound like much of a lawyer when your argue that way. Because there is such a thing as a defense, and a trier of the facts is often persuaded by the testimony of the person charge, or perhaps by other evidence by other witnesses that there was a good ground, let us say, for failing to

be aboard the vessel." R-77.

The Examiner's disposition of this question was more than adequate. Renewal of the argument on appeal does not add to its cogency.

IX

In his supplemental brief, Appellant says:

> "Entrapment is an affirmative defense on the facts in the record to which the Person Charged is entitled on the desertion charge. It is an affirmative defense that the Person Charged 'published his intent' as he did because he was induced or encouraged to do so by the Master, a public servant of the United States, or one cooperating with the United States seeking to obtain evidence against him for the purpose of imposing the sanctions for desertion. The methods used by the Master, on his own testimony, were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it."

The evidence to which Appellant refers is that:

(1) the master knew that Appellant wished to leave the ship in Manila;

(2) the master "refused him a proper mutual consent discharge;"

(3) the master told the agent in Appellant's presence that Appellant planned to miss the ship; and

(4) this provoked Appellant into saying, "You...right I'm going to miss the ship..."

It may be noted first that the reference to the master as a "public servant of the United States" is inappropriate. Under the conditions of the shipping articles, the master, like Appellant himself, was an employee of the United States, but neither was a "public servant" as the term is commonly understood.

Next, it is observed that law of "entrapment" is complex, but it need not be discussed in detail here. A question does not actually arise.

Appellant's argument is predicated on a fundamental misconception of the meaning of a shipping agreement and of a seaman's rights under the articles. No seaman has a right to a "mutual consent" discharge. The term itself precludes such a thought. Under certain conditions a seaman has a right to be discharge, or to leave a vessel without becoming a deserter. No such condition exists here. Appellant was bound to serve to the end of the voyage or until the master voluntarily released him at his own request. The master was not bound to release Appellant simply because he requested release Appellant simply because he requested release from the articles.

What happened here is merely that the master, knowing that Appellant wanted to get off in Manila, and being unwilling to release him, predicted that Appellant would not be aboard at sailing time, and Appellant confirmed the prediction by declaring his intent not to be aboard and by not being aboard.

It may be true that Appellant would not have voiced his intention if the master has not made his prediction. This is not entrapment. The master may, for some purpose, have hoped to elicit a declaration from Appellant to make proof of desertion easier. (I need not consider here whether a case of desertion could have been made out here, without Appellant's declaration of intent, by proof of a course of conduct of leaving vessels without consent at Manila where Appellant's wife lives.) Even if, in a criminal case, a police officer having knowledge or belief that a suspect intends to do something predicts that he will do it and the suspect admits his intention, there is no entrapment. The suspect is still free to do or not do the act and the offense is not committed until the act is done.

Essentially, what Appellant is saying here is that he intended to leave the ship in Manila whether he had a release or not, and that the master was a spoil-sport, first by not consenting to his departure and second by trapping (not "entrapping") Appellant into admitting his intent to leave the vessel.

The supplemental argument is without merit.

ORDER

The order of the Examiner dated at New York, New York, on 30 October 1968, is AFFIRMED.

C. R. BENDER

Signed at Washington, D. C. this 23rd day of February 1971.

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